

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

2010 AUG 16 PM 2:55

STATE OF TENNESSEE, *ex rel.*)
ROBERT E. COOPER, JR.,)
ATTORNEY GENERAL and REPORTER,)

RICHARD R. HOOKER, CLERK

CH D.C.

Plaintiff,)

v.)

Case No. 10C2240

SAMUEL EVINS WOMACK and)
MELINDA RAMSEY WOMACK,)
both individually, and)

AUTUMN RIDGE NURSERY, INC.,)
a Tennessee corporation, and)

SUMMERSTONE NURSERY, INC.,)
a Tennessee corporation,)

Defendants.)

STATE'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO STAY PROCEEDINGS

PRELIMINARY STATEMENT

On February 10, 2010, the Attorney General sent written notification to Sam Womack, Melinda Womack, Autumn Ridge Nursery, Inc. and Summerstone Nursery, Inc. of its intention to file a civil law enforcement action under the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 *et seq.* ("TCPA"). On June 16, 2010, the State filed its Complaint against Autumn Ridge Nursery, Inc., Summerstone Nursery Inc., Samuel Evins Womack and Melinda Ramsey Womack, individually and in their representative capacity. Defendant Sam Womack and Defendant Melinda Womack filed a Chapter 13 bankruptcy petition in the U.S.

Bankruptcy Court for the Eastern District of Tennessee in Winchester, Tennessee. The other two Defendants, Autumn Ridge Nursery and Summerstone Nursery, have not filed bankruptcy. To determine non-dischargeability of debt incurred by fraud, to preserve the amount of debt still owed by the Womack Defendants to consumers in this court action, it was necessary for the State to file an Adversary Proceeding in the U.S. Bankruptcy Court on July 23, 2010.

In summary, the state makes the following arguments. The State's police and regulatory action is not automatically stayed by the bankruptcy action. This Court can determine all of the issues of state law as to all four Defendants. Judicial economy is realized since this Court has all four Defendants before it and can adjudicate liability as to all Defendants. The bankruptcy court does not have all of the Defendants before the court. Enforcement of any monetary award against the two debtor Defendants, assuming their bankruptcy is not dismissed for any reason, will be held in abeyance until the non-dischargeability determination is made. Any restitution awarded could be immediately payable by the two corporate Defendants.

Because the State's Adversary Complaint in the bankruptcy proceeding is limited to the determination of non-dischargeability and this Court cannot make that determination, there is no risk of inconsistent results. As to the Defendants' assertion that there is no immediate need to having the State's case heard in this Court, the need is immediate. Since the individual Defendants filed their Chapter 13 bankruptcy petition on April 15, 2010, over one hundred consumers have filed complaints concerning transactions that occurred since that date. Affidavit of Nathan Casey, attached as Exhibit A to State's Response.

LEGAL ARGUMENT

I. NO BENEFIT TO JUDICIAL ECONOMY WOULD RESULT FROM DELAY IN THIS COURT.

In the instant proceeding, the State seeks a determination of liability of all four Defendants for violations of the TCPA, appropriate injunctive relief, the amount of civil penalties and restitution, and the appropriate amount of attorneys' fees and costs. The State recognizes that any monetary judgment against Defendants Sam and Melinda Womack can only be collected through their bankruptcy proceeding. This Circuit Court, however, maintains jurisdiction over enforcement of its Judgment in all other respects, including any injunctive relief.

The result sought by the State in the adversary proceeding in bankruptcy court differs dramatically from the broad relief sought in this state court civil law enforcement action. In the adversary proceeding in bankruptcy court, the State's action is limited to a determination by the bankruptcy court regarding whether or not the contingent debt owed to consumers in restitution by Defendants Sam and Melinda Womack is non-dischargeable on the basis that the debt was obtained by fraud.

Defendants seek to postpone this police and regulatory action saying that it is cheaper and more convenient for them if the bankruptcy court resolves the "dispute." They ignore, however, the limited reason that the State is a litigant in their bankruptcy and the fact that Defendant Autumn Ridge Nursery and Defendant Summerstone Nursery are not in bankruptcy. Because the bankruptcy court does not have all of the Defendants before it, this Court will need to go forward with this action regardless of the outcome in bankruptcy court.

The only bearing that the bankruptcy court's decision in the adversary proceeding will have on the instant case will be to what extent the State can pursue monetary liability against

Defendants Sam and Melinda Womack from a judgment entered in the instant case after their bankruptcy case is concluded. The non-dischargeability ruling as to the individual Defendants will not extend to the corporate Defendants, which are not in bankruptcy, and will not provide for the permanent injunctive relief sought in the instant action. This injunctive relief is necessary for the protection and welfare of consumers and legitimate businesses.

II. THE STATE'S CHARGE TO PROTECT THE PUBLIC INTEREST AND TO ENSURE THAT CONSUMER TRANSACTIONS ARE ACCOMPLISHED IN ACCORDANCE WITH CONSUMER PROTECTION LAWS IS BEST ACCOMPLISHED IN THIS COURT.

The court in *F.T.C. v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176 (C.D. Cal. 2000), refused to stay a civil suit filed by the Federal Trade Commission against an adult internet site company alleging the commission of unfair and deceptive business practices, despite the fact that the principal of the company also faced a criminal action. The court commented on the significant prejudice to the FTC that a delay would cause. The court determined that the FTC's interest in proceeding expeditiously with the litigation, along with the interests of third parties whose activities or lives would be affected by the outcome of the litigation, disfavored a stay. Any delay of this state court proceeding prejudices the State. The State's interest in proceeding expeditiously in seeking a Judgment including a permanent injunction against all four Defendants to mandate their compliance with the Tennessee Consumer Protection Act and the F.T.C. Mail Order Rule overrides Defendants Sam and Melinda Womack's concerns about their expenses. There is no need for additional consumers to become victims of Defendants' unfair and deceptive acts and practices described in the State's Complaint. This is a real concern since Defendants Sam and Melinda Womack filed their bankruptcy in April 2010, over one hundred more consumers have been victimized by Defendants' unlawful acts and practices. Affidavit of Nathan Casey, attached as Exhibit A to State's Response.

III. THIS POLICE AND REGULATORY ACTION BY THE STATE OF TENNESSEE TO PROTECT THE PUBLIC IS NOT AUTOMATICALLY STAYED.

The Sixth Circuit Court of Appeals has held that a bankruptcy court's exclusive jurisdiction over the debtor, the bankruptcy proceeding and the property of the estate **extends only as far as the automatic stay**. *Chao v. Hospital Staffing Services, Inc.*, 270 F. 3d 374, 383 (6th Cir. 2001). Furthermore, the Court recognized that 11 U.S.C. § 362(b)(4) provides an exception from the automatic stay for a government unit's exercise of its police and regulatory powers. *Chao*, 270 F. 3d at 385; *see also* Judge Cook's opinion in *Winpar Hospitality Chattanooga*, 401 B.R. 289(Bankr. E.D. Tenn. 2009). The Tennessee Legislature considers violations of the Tennessee Consumer Protection Act to be a threat to the public's welfare, making each unfair and deceptive act both a criminal and civil violation. *See* Tenn. Code Ann. § 47-18-104(a).

This action brought in the public interest, pursuant to the Attorney General's police and regulatory authority, is not subject to the automatic stay imposed by 11 U.S.C. § 362. Congress has created an exception to the automatic stay which applies in the instant case. 11 U.S.C. § 362(b)(4) states:

[U]nder paragraph (1), (2), (3), or (6) of subsection (a) of this section of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

Yet Defendants Sam and Melinda Womack and presumably, Defendants Autumn Ridge Nursery and Summerstone Nursery ask this Court to stay enforcement proceedings that Congress

declares should not be stayed. The Bankruptcy Code provisions concerning the automatic stay yield to state and federal governmental interests in securing compliance with certain aspects of the state or federal authorities' respective regulatory and police powers. *In re Commerce Oil Co.*, 847 F.2d 291, 295 (6th Cir. 1988) (holding the Tennessee Water Quality Control Board's proceedings to fix civil liability against a debtor under the Tennessee Water Control Act falls within the police power exception). The exception permits this Court to determine questions of state law and permits the entry of a money judgment. It does not, however, extend to permit enforcement of a money judgment against the two individual Defendants. *Id.* at 295.

In assessing whether the proceedings before it fall within the automatic stay, the Court must consider that one exception to the automatic stay--provided for in 11 U.S.C. § 362(b)(4)--is triggered when the government proceeds against a debtor "to enforce such governmental unit's police and regulatory power." *Chao*, 270 F. 3d at 385. When a governmental unit undertakes an enforcement action under the police power exception, it need not petition the bankruptcy court for permission to proceed in the ordinary course. *Id.* This Court has the authority and competence to determine that the automatic stay does not apply to this police and regulatory action. *Id.* at 384.

To determine whether an action is excepted from the automatic stay as a police and regulatory action, two tests are applied: the pecuniary purpose test and the public policy test. *Chao*, 270 F.3d at 385. The pecuniary purpose test focuses on "whether the governmental proceeding relates primarily to the protection of the government's pecuniary interest in the debtor's property" or "to matters of public safety." *Id.* "Proceedings which relate primarily to matters of public safety are excepted from the stay." *Id.* The court explained the public policy test as an inquiry into whether the proceedings "adjudicate private rights" or "effectuate a public

policy.” *Chao*, 270 F.3d at 385-6. Those proceedings that do effectuate public policies are likewise excepted from the stay. *Id.* at 386. The court states that “where a governmental unit is attempting to fix damages for violation of [a police or regulatory law], the action or proceeding is not stayed under the automatic stay.” *Id.* Indeed, says the court, “Paragraph (5) makes clear that the exception extends to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment.” *Id.* Finally, the court categorizes laws that fall under the police and regulatory power of the government as those that affect “health, welfare, morals, and safety.” *Id.*

Applying either approach advocated by the 6th Circuit in *Chao*--the pecuniary purpose test or the public policy test--the facts at hand warrant a finding that this proceeding seeking injunctive relief is exempt from the automatic stay.

The State is not seeking to impose penalties against Defendants for pecuniary purposes or to protect its pecuniary interest in their property. The relief is sought in order to deter the Defendants and others from violating the TCPA, to prevent Defendants from engaging in future violations, and to protect the welfare of members of the public from harm resulting from violations of the TCPA. The purpose of this enforcement action is bigger than the Defendants. The State must protect the integrity of trade and commerce in the public interest.

The Sixth Circuit has held that penalties imposed under the Tennessee Water Quality Control Act, Tenn. Code Ann. § 69-3-101 *et seq.*, were not assessed by the state for primarily pecuniary purposes. *In re Commerce Oil Company*, 847 F.2d 291, 295 (6th Cir. 1988). There, the court stated that the purpose of the Water Act was to protect the State’s waters so that they could be “used and enjoyed to the fullest extent.” *Id.* at 296. Damages under that Water Act were assessed in light of several factors, including deterrence. *Id.* As a result, the court found

that “the rationale, policy, and factors expressed” in the Water Act were not “based upon the state’s ownership of or pecuniary interest in the natural resources of Tennessee.” *Id.* Instead, the court found that the goals of the Water Act, such as “punishing wrongdoers [&] deterring illegal activity” were “exercises of the state’s regulatory power to effectuate public policy and [were] not actions based upon the state’s property interests.” *Id.* In further support, the court noted that the state conceded that although it could fix civil liability under 11 U.S.C. § 362(b)(4), it could not “collect any penalties assessed” and would “have to pursue its claim subject to the jurisdiction of the bankruptcy court.” *Id.* With that in mind, the court stated, “It is difficult to see what pecuniary advantage the state sought to gain in the debtor’s estate or what pecuniary purpose would be served by assessing civil liability against [the debtor].” *Id.*

Further, where the State is seeking injunctive relief to prevent the Defendants from committing future violations of the TCPA, or alternatively, to revoke the corporate Defendants’ business licenses, both the pecuniary purpose and public policy tests are satisfied. The Womacks’ bankruptcy case does not stay this action as to them.

Because the two corporate Defendants are not in bankruptcy, this Court constitutes the appropriate jurisdiction for those entities.

IV. AFFIDAVITS SUBMITTED BY DEFENDANTS SAM AND MELINDA WOMACK FAIL TO SUPPORT THEIR REQUEST FOR A STAY.

While this Court has the discretion to stay proceedings in appropriate circumstances, the self serving, immaterial statements made by Defendants Sam and Melinda Womack fail to establish a legally cognizable reason to postpone these proceedings. Defendant Melinda Womack avers that she has resolved “almost all” of the four hundred consumer complaints made to the Better Business Bureau (“BBB”). She also indicates that this number of complaints is not large in terms of the volume of business done by Autumn Ridge Nursery and Summerstone

Nursery. Her statements, true or not, do not provide a reason to stay these proceedings, but may instead provide a reason for expediting these proceedings. More than three years have passed and hundreds of complaints have been received since the alleged resolution to the BBB's complaints in 2007. Summerstone Nursery, Inc. did not even begin business until 2008. Most recently, over one hundred complaints have been filed with the Division of Consumer Affairs, the BBB, and the Federal Trade Commission by consumers regarding problems with Defendants since the Womacks filed bankruptcy on April 15, 2010. Affidavit of Nathan Casey, attached as Exhibit A to the State's Response.

Defendant Sam Womack's affidavit seems to say that no dissatisfied customer has ever sued Autumn Ridge Nursery or Summerstone Nursery. A lawsuit by an individual customer is not likely to be brought when the amount of harm at stake may be much less than the cost of suing Defendants. This leads to the conclusion that the injunctive relief before this court is extremely important. Notably, Defendant Sam Womack fails to report that he, individually, and his former business, Womack Nursery Co., Inc., were both subject to a Federal Trade Commission Consent Order for five years, beginning in 1978. That FTC Consent Order involved many of the same unfair and deceptive practices with which the State is concerned in this case.

Defendant Sam Womack states that he and his wife have a hard time meeting their expenses. This statement seems questionable considering that he also states that his companies have shipped 350,000 customer orders since 2003.

CONCLUSION

For these reasons, the State respectfully requests that this Court deny Defendants' motion to stay this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was sent via U.S. Mail on August 16, 2010, to:

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